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REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON
GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

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REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

WEDNESDAY, AUGUST 4, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2247, Rayburn House Office Building, Hon. Joe Scarborough (chairman of the subcommittee) presiding.

Present: Representatives Scarborough and Cummings.

Staff present: George Nesterczuk, staff director; Ned Lynch, professional staff member; John Cardarelli, clerk; Garry Ewing, counsel; Jennifer Hemingway, legislative assistant/scheduling; Tania Shand, minority professional staff member; and Earley Green, minority staff assistant.

Mr. SCARBOROUGH. I'd like to call this hearing to order and welcome you all. I would certainly like to thank our witnesses for coming and speaking today. I apologize for the delay. Actually, I was walking down the hall and had on my card that this is in 2203. I stopped Mr. Cummings, our distinguished ranking member, and I dutifully told him he was going in the wrong direction so we enjoyed the first few minutes of John Mica's subcommittee hearing and then decided to come over here to the correct room. So I followed Mr. Cummings and will do so in the future, possibly even on issues like long-term care. I have more confidence in you this morning than myself.

Again, thank you for coming. We're going to be conducting a hearing now to review the operations of the Office of Government Ethics in preparation for our legislation to reauthorize the agency. This Nation has always recognized that the character of our highest elected officials is vital to the success of our representative government. That goes for our appointed officials also. A periodic review of the works of the office established to enforce the ethical standards of Federal service permits us to assess our progress in complying with the intentions and the spirit of the ethics laws.

The Office of Government Ethics, a small but very well respected agency, promulgates policies and ethical standards that are implemented by a network of more than 120 designated agency ethics officers. It also provides training and educational programs through more than 8,500 employees who conduct ethics training to provide guidance to employees throughout the government. Most of these employees work in agency counsels' offices and perform their ethical responsibilities as collateral duties related to other work.

The Ethics in Government Act relies heavily upon financial disclosure requirements to guard against conflicts of interest. Senior officials are expected to disclose their assets and recuse themselves from decisions that might provide even an appearance of conflicts of interest. The act also restricts the work that government employees can perform after they leave office. As our witnesses will testify today, these conditions are meant to have a serious effect on government employment, particularly at the highest levels.

It is not clear, however, that our ethics rules have produced more ethical government. Our current President pledged as a candidate that he would have "the most ethical administration in history." When he entered office, he issued an Executive order tightening the post-employment restrictions on people who would serve in his administration. Our experience with this administration, however, forces us to question whether financial disclosure and post-employment restrictions are adequate to address problems associated with integrity in our public officials. The list of this administration's questionable practices is too long to ignore and they will go well beyond the use of the White House for improper campaign fund raising. Unfortunately, it is not clear that all of the administration's actions are prohibited by current law. As we continue reauthorizing the Office of Government Ethics, we should examine whether some of those practices warrant changes in the underlying laws that we have now.

For example, the administration's Health Care Task Force included many "special government employees." These people continued to work and receive compensation from private organizations that had substantial interests in the outcome of the task force's policy recommendations. Their activities raised much controversy concerning conflicts of interest.

Then there were the so-called volunteers working in the White House, more than half of whom were actually on the payroll of the Democratic National Committee while working in the White House. Others worked at the White House while on the payroll of various special interest groups.

Finally, we have the example of John Huang. This political fundraiser received more than $700,000 from his former employer, the Lippo Group, before taking a position in the International Trade Administration at the Department of Commerce. Do large severance payments from former employers prior to government employment give the appearance of a conflict of interest or at least raise a specter of doubt?

In addition to these issues, we should also consider whether the sanctions associated with violations of current law are adequate to deter and/or punish unethical conduct in office. The Office of Government Ethics currently refers criminal violations to the Department of Justice, which has primary responsibility for any prosecutions. Has this avenue of prosecution been adequate?

These questions appear simple, but they arise because even the careful design of previous legislation did not address all of the potential areas of public concern. I do not anticipate a comprehensive review of the alleged improprieties, but I believe our reauthorization of this agency should at least address the concerns that we have developed from our recent experience.

Obviously I think that makes all of us stronger whether we're talking about looking at a Republican administration or a Democratic administration, whether we're talking about this current administration or administrations in the future.

Our witnesses today are Mr. Stephen D. Potts, the Director of the Office of Government Ethics. He is now serving his second 5-year term and that term will expire in June of next year. Our second witness today is Mr. Gregory S. Walden. Mr. Walden is currently counsel at the firm of Patton Boggs, but he was invited to serve as a witness today because of his role in overseeing Ethics in Government Act compliance as associate counsel to President Bush. He has since continued studies related to the Ethics in Government Act and published a book on the topic entitled "Our Best Behavior."

And with that, I would like to turn it over to Mr. Cummings for any comments he may have.

[The prepared statement of Hon. Joe Scarborough follows:]

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INDEPENDENT

Opening Remarks of the Honorable Joe Scarborough
Chairman, Civil Service Subcommittee
Oversight Hearing on the Reauthorization of the Office of Government Ethics
August 4, 1999

This hearing is being conducted to review the operations of the Office of Government Ethics in preparation for our legislation to reauthorize the agency. This nation has always recognized that the character of our highest elected and appointed officials is vital to the success of representative government. A periodic review of the workings of the Office established to enforce the ethical standards of federal service permits us to assess our progress in complying with the intentions and the spirit of the ethics laws.

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The list of this Administration's questionable practices is too long to ignore, and they go well beyond the use of the White House for illegal campaign fundraising. Unfortunately, it is not clear that all of this Administration's unsavory actions are prohibited by current law. As we consider reauthorizing the Office of Government Ethics, we should examine whether some of those practices warrant changes in the underlying law.

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Mr. CUMMINGS. Mr. Chairman, I appreciate your convening this hearing on the Office of Government Ethics. It's been a number of years since the subcommittee has held an oversight hearing on OGE and it is prudent that we establish a record of how the agency is operating. OGE's mission is not only to prevent and resolve conflicts of interest and to foster high ethical standards for Federal employees but also to strengthen the public's confidence that the government's business is conducted with impartialialty and integrity. OGE does this by reviewing and certifying the financial disclosure forms filed by Presidential nominees requiring Senate confirmation, serving as a primary source of advice, and counseling on conduct and financial disclosure issues and by providing information on and promoting understanding of ethical standards and executive agencies. OGE and its staff are well regarded by Federal agencies with whom they do business.

Mr. Gregory Walden, who will be testifying before us shortly, stated in his prepared remarks that OGE has played an essential and significant role in fostering the public's trust in the integrity of government. OGE has performed exceptionally well and deserves to be reauthorized, and I am sure that the rest of the day's testimony will prove that to be the case. There is no question that Mr. Stephen Potts has done an outstanding job along with his staff, and we thank you for your service.

I look forward to hearing from all of today's witnesses regarding OGE's reauthorization. Thank you.

Mr. SCARBOROUGH. If I could ask our witnesses to stand so we can administer the oath.

[Witnesses sworn.]

Mr. SCARBOROUGH. Thank you. Be seated.

Why don't we go ahead and start with Director Potts.

STATEMENT OF STEPHEN D. POTTS, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY MARILYN GLYNN, GENERAL COUNSEL

Mr. POTTS. Thank you very much, Mr. Scarborough. Mr. Chairman and members of the subcommittee, first of all let me just acknowledge the presence of Mr. Greg Walden. He's been a colleague over the years. We've continued to enjoy working with him from time to time and have great respect for what knowledge and information he has brought to the ethics community. We're very happy that even though he's in the private sector, that he continues to do so.

I want to thank you for the opportunity to appear today to discuss the reauthorization of the Office of Government Ethics. And I will keep my remarks brief. And I request the subcommittee to include my formal statement as part of the hearing record.

Mr. SCARBOROUGH. Without objection, so ordered.

Mr. POTTS. With me today is OGE's General Counsel, Marilyn Glynn.

The 3 years since our last reauthorization have passed quickly and for OGE we believe very productively. I'd like to take this opportunity to review briefly some of our accomplishments during these last 3 years.

Over 2 years ago to enhance our program capabilities, we reorganized our Office of Education and created a new Office of Agency Programs with three separate divisions. One was education and program services. Two was financial disclosure and the third was program review. This reorganization committed more resources to OGE's education and training functions. OGE now provides more direct service to agencies through our desk officer program and we have developed employee training materials such as a computer-based ethics game, pamphlets, and new video training tapes. We've also provided new courses designed for the education of ethics officials, including conference style workshops for ethics officials out in the various regions of the United States.

In addition, our program reviews have focused not only on determining if reviewed agencies were maintaining their programs properly but also on finding and sharing best practices of agencies in carrying out the various elements of their programs which we could then in turn share with the other agencies of the Federal Government.

Over the past 3 years to implement the ethics program and serve the ethics community, OGE has made more effective use of technological advances. We've developed a website for easy dissemination of information to the ethics program community, to employees and to the public. In addition, we've developed a CD–Rom containing all of the basic resource and reference material important to the program. We've developed software that is used in the completion of the confidential financial disclosure forms filed by over 250,000 employees in the executive branch, and we're in the process of developing the software necessary for the completion of the public financial disclosure reports, which of course are filed by a far smaller universe of filers.

Recently as the United States and other countries and organizations have focused on the effect of corruption on governments and economies throughout the world, we have been called upon by U.S. foreign policy agencies to provide technical assistance regarding the elements of a corruption prevention program as one part of the government's overall anticorruption efforts. In response to requests from these agencies and also from foreign countries and multinational organizations for information about our program, we have met with more than 550 visitors from over 55 countries in our offices. And we've also as personnel time permitted and usually with the financial support of U.S. foreign policy entities, participated in anticorruption programs held abroad.

Over the past 3 years, OGE has continued to devote a substantial amount of our resources to our ongoing programs. We've continued to review and certify the financial disclosure forms filed by Presidential nominees requiring Senate confirmation and serve as the primary authority on conduct and financial disclosure issues.

During these past 3 years, we handled 724 nominee forms and approximately 3,000 annual and termination financial reports. In addition, we continue to provide interpretive guidance on the criminal conflict of interest statutes and to review and update our regulations for the standards of conduct.

As you know, earlier this year our office sent draft legislation requesting an 8-year reauthorization. We hope that you'll favorably

consider our proposal and our desire that future authorizations not expire during the first or fourth years of a Presidential term. Our programmatic responsibilities in the areas of nominee financial disclosure reviews and transition post employment advice places a greater strain on our resources during those particular years, the first and fourth years of a Presidential term. Consequently, we believe it's more helpful for us and for Congress for our reauthorization review to occur outside those 2 years.

Now, it's true that a 3 or 4-year period of authorization would avoid the problematic first and fourth years of a Presidential administration, but we believe there are good reasons to authorize OGE for 7 or 8 years. First, our track record over the past 20 years of existence. I think that we have shown during those 20 years that this organization has operated in a nonpartisan and a very professional and effective way. So I think that's one reason to reauthorize this office for 7 or 8 years.

Second, I think this is a very fundamental program. This is not some program that should run out. There are a lot of programs that sort of have their day and accomplish their mission. Then you move on and maybe they ought to be sunsetted. But this is something that is very fundamental because the fundamental tenet of our program is public service is a public trust. That is something that is permanent and should be permanent as part of the government. And so we want to make sure that this office is around to try to be the source for our implementing the strategy of public service being a public trust.

The third is the size and care that we've taken with our budget. First of all, as to size, I mean, we are a tiny agency right now. We have about 80 employees and we have a total budget of about $9 million. So in terms of size and budget contrasted to the other agencies and departments, we are tiny. I think that's another reason why we should be given a longer authorization period in light of our mission and small budget.

And finally, the resources that both our Office and the Congress must expend in a reauthorization process. It would be one thing if the only opportunity for the Congress to review our activities would be the reauthorization process. Then I might say that yes, it should be more frequent than just what we're requesting to have a reauthorization for 7 or 8 years. But of course as we've said, any time that this committee or any Member here or in the Senate wants to ask us questions and wants us to come up and explain our program and talk about it in detail, we are always available. We welcome that interest in our program because we are always trying to make the program better and to improve it. And in addition to that, as you noted, Mr. Scarborough, my term ends next year, and our experience is that in connection with the consideration of a new nominee, the Senate usually conducts a review of our agency's program and gets into it in some detail in that context.

So I would anticipate when a new nominee to be director of the Office is being considered next year, at least on the Senate side, there will be a consideration in great detail of our program. And then finally, we have of course the responsibility to report under the Government Performance and Results Act exactly what results we have had and what our performance has been. I think there is

now a mechanism in place that really hasn't been to consider exactly how we are doing and for this committee to stay on top of really what's going on at OGE. So for all of these reasons, I want to urge you to authorize the agency for either 7 or 8 years.

Now, in closing, let me just shift gears briefly. Your letter of invitation posed a number of questions and I've addressed those in my written statement. If you'd like further elaboration or clarification, of course I'll do my best to respond. I'd be happy to answer any other questions that you have about OGE, our programs, or about our reauthorization legislation. I want to thank you for the opportunity to appear today.

[The prepared statement of Mr. Potts follows:]

STATEMENT OF

STEPHEN D. POTTS
DIRECTOR, OFFICE OF GOVERNMENT ETHICS

ON

THE REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE
COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

ON

AUGUST 4, 1999

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to appear today to discuss the reauthorization of the Office of Government Ethics (OGE). I would like to take this opportunity to review our role and some of our accomplishments during these last three years. Following this review, I will address the questions that you posed in your letter of invitation to me.

The ethics program that OGE administers is primarily an internal program for the executive branch. Pursuant to the Ethics in Government Act in which OGE was created, OGE has overall responsibility for executive branch policies related to preventing conflicts of interest on the part of officers and employees. Unlike part of the roles of the Committee on Standards of the House of Representatives or the Senate's Select Committee on Ethics, this Office is not an investigatory/enforcement agency. We administer a primarily preventative program, leaving investigations and enforcement to other entities within the executive branch with those mandates. As we noted in our last Biennial report to Congress, our role has, since OGE's creation in 1979, expanded by statute and Executive order. We now provide interpretive guidance on, and administrative support for, a number of additional requirements related to employee conduct. And, more recently, as the United States and other countries and organizations have focused upon the effect of corruption on governments and economies throughout the world, we have been called upon by U.S. foreign policy agencies to provide technical assistance regarding the elements of a preventative program as one part of any government's overall anti-corruption efforts.

At its heart, the purpose of the ethics in Government program is to ensure that executive branch decisions are not tainted by any question of conflicts of interest on the part of the employees involved in the decisions. Because the integrity of decision making is fundamental to every Government program, the head of each agency has primary responsibility for the day-to-day administration of the ethics program for the employees who carry out the substantive programs of that agency.

Each agency head selects an individual employee of the agency to serve as the agency's Designated Agency Ethics Official (DAEO). The DAEOs and their staffs conduct the executive branch program on-site, providing advice and training, reviewing financial disclosures and assisting with resolution of individual conflict issues when they arise. Investigations of individual employee misconduct are generally conducted by an agency's Inspector General.

OGE's Areas of Responsibility

OGE focuses on the six areas of responsibility that have been the bedrock of OGE's program since its inception.

1. Regulatory authority. We develop, recommend, promulgate and review rules and regulations pertaining to conflict of interest, post-employment restrictions, standards of conduct, public and confidential financial disclosure, and employee ethics training.

2. Financial disclosure. We review executive branch public financial disclosure reports of certain Presidential nominees/appointees to assess potential violations of applicable laws or regulations, provide counseling on the avoidance of conflicts, and, if necessary, recommend appropriate corrective action. In conjunction with financial disclosure, we administer the executive branch blind trust and certificate of divestiture programs.

3. Education and training. We implement a statutory responsibility to educate employees about the ethical standards by training agency ethics officials and assisting agencies with their internal education programs.

4. Guidance and interpretation. We issue formal advisory opinions; provide informal advice letters and policy memoranda and give oral advice on how to interpret and comply with requirements of criminal conflict of interest, post-employment and civil "ethics" statutes, standards of conduct, and financial disclosure requirements. We also consult with agency ethics officials in individual cases.

5. Enforcement. We monitor agency ethics programs, including financial disclosure systems; refer, along with individual agencies, possible violations of conflict of interest laws to the Department of Justice; serve as an advisor on investigations, prosecutions and appeals; and in limited circumstances, investigate possible ethics violations and order corrective action or recommend disciplinary action.

6. Evaluation. We evaluate the effectiveness of conflict of interest laws, other related statutes, standards of conduct and Executive orders and recommend appropriate amendments, repeals or new provisions.

Strategic Plan

To fulfill our responsibilities, we have developed a strategic plan. Four major goals were identified: (1) providing overall policy direction to the executive branch ethics program; (2) assisting agencies in carrying out their own ethics program activities; (3) providing effective educational and training opportunities and materials; and (4) administering an outreach program.

Reorganization and New Initiatives

Since our last reauthorization, in order to better achieve our strategic goals, we reorganized our Office of Education and created a new Office of Agency Programs with three separate Divisions -- Education and Program Services, Financial Disclosure, and Program Review. This reorganization committed more resources to OGE's education and training functions.

OGE now provides more direct service to agencies through our desk officer program and we have developed employee training materials such as a computer-based ethics game, pamphlets and new videos. We have also provided new courses designed for the education of ethics officials including conference style workshops for ethics officials in the regions.

Our program reviews have focused not only on determining if reviewed agencies were maintaining their programs properly but on finding and sharing best practices of agencies in carrying out the various elements of their programs. During 1996-1998, we reviewed the ethics programs of numerous Departments and agencies and issued 128 reports to Designated Agency Ethics Officials. These reports covered reviews of approximately 209 ethics programs located in Departments, agencies and military facilities. OGE also conducted 60 follow-up reviews to verify agencies' progress on implementing recommendations resulting from ethics program reviews.

We have also made more effective use of technological advances such as the development of a comprehensive Web site for easy

dissemination of information to the ethics program community, employees and the public. We have developed a CD-ROM containing all of the basic resource and reference materials important to the program, and have developed software used in the completion of the confidential financial disclosure forms filed by over 250,000 employees in the executive branch. We are in the process of developing the software necessary for the completion of public financial disclosure reports.

In response to requests from the various foreign policy agencies of the U.S. as well as requests from foreign countries and multinational organizations for information on our program, OGE has met with more than 550 visitors from over 55 countries in our offices. We have also, as personnel time permitted and usually with the financial support of U.S. foreign policy entities, participated in anti-corruption programs held abroad. At the end of February, OGE led a panel discussion regarding ethics programs in a plenary session of the Global Forum on Fighting Corruption sponsored by the Vice President's office. The Forum had more than 500 participants from governments, NGO's and multinational organizations from 91 countries.

Ongoing Programs

In addition, we continued to devote a substantial amount of our resources to ongoing programs. The timely review and certification of financial disclosures of Presidential appointees requiring Senate confirmation is always a priority and the last three years have included a Presidential election with accompanying personnel changes in some of the most senior positions in the executive branch. We continued to review and certify the financial disclosure forms filed by Presidential nominees requiring Senate confirmation (724 nominees for the three year period and approximately 1000 annual and termination reports each year) and to serve as the primary authority on conduct and financial disclosure issues.

We also continued to review the effectiveness of all our regulations, and in so doing, made clarifying amendments to the Standards of Ethical Conduct for Executive Branch Employees; the tax deferral remedy afforded by the certificate of divestiture; the public and confidential financial disclosure requirements; and the agency component designations for post-employment. In our role of issuing regulations implementing the criminal conflict of interest statutes, we issued a final rule exempting certain financial interests for purposes of the application of the primary financial conflict of interest statute.

We continued to host the well-received annual conferences of agency ethics officials. These conferences are designed to provide officials with an opportunity to discuss common problems and concerns and to share solutions at a site away from the immediate

demands of their offices. The conferences also give OGE an opportunity to communicate directly with the entire ethics program community. Interest in these conferences is well above the number we have been able to accommodate with the facilities available. Even so, attendance each year has been in the range of 450-475 participants. However, OGE has tried to ensure that all agencies have an opportunity to send at least one official and, as a result, at least 100 agencies have been represented at each of the conferences.

Resources

Throughout 1996-1998, OGE's use of resources has remained stable and fiscally responsible. Actual staff time equated to 77-80 FTE for each of these years and appropriated funds have been 7.8, 8.1, and 8.3 million dollars respectively. We have a current fiscal year appropriation of just under 8.5 million dollars which would support an FTE level of 84. For Fiscal Year 2000, we are requesting 9.1 million dollars which will enable us to maintain our current program level.

Authorization Term

The Administration proposed a reauthorization through Fiscal Year 2007. This period of reauthorization is generally consistent with the periods of authorization OGE has received in the past. Historically, OGE has had authorization terms of 4+, 5, and 6 years followed by 2 years of no authorization and then a 3 year authorization. During our last reauthorization, our oversight committees supported the concept that reauthorization should be avoided during the first and fourth years of a Presidential term -- years in which OGE's workload is increased by the need to review and certify to the Senate financial disclosure reports for Presidential appointees requiring confirmation, and to handle transition/election issues. However, because Congress had new leadership, our committees expressed an interest in reviewing our program initially in less than the seven years that would have been required to meet that cycle. We understood that desire but believe that our performance over this last three year period as well as the seventeen years preceding it comfortably support a seven or eight year reauthorization.

While a three or four year period of authorization would avoid the problematic first and fourth years of a Presidential administration, we believe our 20 year performance record, the importance of the ethics program, the size of the budget, the care we take with the budget we are given, and the resources both our Office and Congress must expend in a formal reauthorization process do not call for such a short period. We are, of course, always willing to and have often discussed our program with Congress whenever a Committee wishes and we will be providing the results of our annual performance plan beginning next year. In addition, we

have considerable dealings with each Senate confirming committee and because my term of office expires in August 2000, a hearing for a new Director would presumably need to occur either around that date or early the following year. It was my experience that a confirmation hearing for a Director is also an opportunity for the Senate to explore issues concerning OGE's program. In sum, we believe that an authorization of seven or eight years still provides Congress with ample opportunities to review our program without the need for a formal authorization process and its deadlines.

Response to Specific Questions

With regard to the questions that were in the letter of invitation, I would first like to make some general statements concerning the authorities that underlie the executive branch ethics program so that my answers will hopefully have more context. The primary conduct restrictions that are a part of the executive branch ethics program are not found in the Ethics in Government Act. They are found in the criminal conflict of interest statutes, 18 U.S.C. §§ 202-209, the executive branch standards of conduct, part 2635 of title 5, C.F.R., and certain civil conduct provisions found in title 5 U.S.C. and 5 U.S.C. app. The public financial disclosure requirements are also found at 5 U.S.C. app. Only the financial disclosure provisions were newly enacted as a part of the Ethics in Government Act. The criminal conflict of interest statutes, while amended by the Ethics in Government Act and/or the Ethics Reform Act, have their modern basis in a 1962 act, although many were in existence in other forms since the mid to late 1800s. Thus, while the Ethics in Government Act created the Office of Government Ethics, it is not the source for the authorities (except financial disclosure) that make up the substantive elements of the ethics program.

Your first question focused upon a concern for conflicts that may arise out of severance arrangements individuals who are entering Federal executive branch service may have with former private employers. Two criminal conflict of interest statutes could potentially apply to those payments. The first is the bribery statute, 18 U.S.C. § 201. Although it is the Department of Justice, not OGE, which interprets section 201, we know that statute nonetheless might be implicated depending upon the purpose of the payment. The second is 18 U.S.C. § 209. OGE does provide advice about section 209 under an agreement with the Department of Justice. Until the Supreme Court issued its opinion in Crandon v. United States, 494 U.S. 152, (1990), this Office had interpreted 18 U.S.C. § 209 as prohibiting severance payments made by employers to prospective executive branch employees as compensation for services as an officer or employee of the executive branch. Payments made as a part of a pre-established bona fide employee benefits plan not dependent upon Federal service were considered acceptable specifically because of one of the exceptions in

subsection (b) of section 209. Thus, severance arrangements were scrutinized fairly carefully by this Office and by agencies to determine if they were a part of such a plan.

As a result of the Supreme Court's opinion that section 209 applies only to payments made to employees and not to prospective employees, severance payments now raise concerns only if the payments are made after the individual is appointed and has become an employee. In response to that opinion and in order to address a concern we have with these types of payments, OGE included in the executive branch standards of conduct a specific recusal requirement for officials who have received an "extraordinary payment" prior to entering Government service. This provision is found at 5 C.F.R. § 2535.503. In general, it requires a two-year disqualification from particular matters in which the former employer is a party or represents a party. An individual who follows the standards would for some time be quite limited in the advantages that he or she might provide that former employer.

Your second, fifth and sixth questions involve the use by the Government of a private sector individual or individuals, who through special programs are not afforded or expected to attain full career status, to carry out Governmental functions, or programs to enhance the mobility of mid-level managers in and out of the Government. Your questions indicated some concern about the use of private sector individuals to carry out responsibilities that have traditionally been carried out by career officials. It is our position that the criminal conflict of interest statutes apply now to any individual in the executive branch who: (1) is retained, designated, appointed or employed by a Federal officer or employee; (2) carries out a Federal function; and (3) is supervised by a Federal officer or employee. This arises from our reading of 18 U.S.C. § 202 which contains the definition of a special Government employee (SGE) along with long-standing interpretations by the Office of Legal Counsel as to the factors that make an individual an employee for conflicts purposes. Thus, regardless of the program or the agency which utilizes the individuals' services or whether the individuals are paid or receive benefits, absent specific statutory exemptions, we believe individuals utilized by the executive branch who meet that three part test are, and should be, governed by the criminal conflict of interest statutes and the standards of conduct for executive branch officials. This means that SGEs, like all Federal employees, are prohibited from working on matters that will directly and predictably affect their financial interest, including those of their private employer. The public deserves to have Federal functions carried out by individuals who are free from personal or institutional financial conflicts. An agency or department that does not make this clear to the individuals whose services they utilize in these circumstances unacceptably exposes those individuals to possible criminal sanctions and subjects Governmental processes to potential criticism. Any trend toward using services of individuals who are

not regular Government employees simply increases the need for ensuring that agencies understand the restrictions under which those individuals serve and that those individuals are counseled accordingly. These programs along with mobility programs do not alter the reason for the restrictions on those who carry out these Federal functions nor do we see a sound ethics policy for any such change. In fact, many agencies have found that by using SGEs they can benefit greatly from the skills and expertise of private individuals who, for whatever reasons, would not offer their services to the Federal Government on a full-time basis. It is important that the Government continue to be able to draw on this valuable resource for discrete and short-term needs. We do not believe that it is ethically necessary to limit agencies' use of the services of SGEs as long as those SGEs and the agencies adhere to the conflicts rules that currently exist. Again, the public deserves impartial decision makers, but it also deserves the opportunity to benefit from SGEs. The conflict of interest statutes, as they currently exist, provide the necessary protections to ensure impartial decision makers.

Your third question concerns what effect the conflict of interest statutes, the standards of conduct and the financial disclosure requirements may have had on deterring individuals from executive branch service or delaying appointments. With regard to deterring Federal service, this Office does not have, and is not in any position to have, any statistical information indicating whether "ethics" statutes and regulations have had an effect upon recruiting and retaining Government employees. Over the 20 years of our existence, of course, we have some anecdotal information about the difficulty of filling certain positions in the Government. No Office of Presidential Personnel of which we are aware has kept any statistics on the reasons for which individuals who have been approached for possible appointment have declined or have withdrawn from consideration early in the process. Certainly by the time we are aware that an individual is being considered for a Presidential appointment, that individual is already aware of the requirement for financial disclosure and must generally understand that his or her activities must comport with the ethics requirements. With regard to all other executive branch appointments, we are not aware of any requirement or even practice in which an agency has collected statistics on the reasons individuals do not accept Federal job opportunities at least ones that would include ethics restrictions as a possible reason.

With regard to delaying appointments, this Office, as well as the agency in which an individual might serve, does review the financial disclosure reports of individuals whom the President is considering for nomination or whom he has nominated. Draft financial disclosures are provided to our Office and the agency involved shortly before an individual is expected to be nominated. We immediately review that draft in conjunction with the agency and seek to work out the steps the individual must take in order to

avoid any financial conflicts if appointed to the position. Once the President actually nominates the individual and we have received the final financial disclosure form from the agency, we typically make a final review of the report and send it with an opinion letter to the confirming committee within 2 working days. We work closely with the Senate confirming committees to ensure that our part of the review does not delay confirmation and we believe we have been very successful. Certainly any lengthy review by our Office has not been without the support of the White House and the confirming committees involved.

Your fourth question concerns enforcement. The penalties available for failure to file or false filings of the financial disclosures required by the Ethics in Government Act are by statute civil in nature and carried out by the Department of Justice; late filing fees are administrative and imposed by the agencies. (5 U.S.C. app. § 104) A false statement on a financial disclosure report may also subject a filer to the criminal penalties imposed for false statements under 18 U.S.C. § 1001. The sanctions for violating the conflict of interests statutes can be criminal or civil and the Attorney General can also seek injunctive relief (18 U.S.C. § 216). The penalties for violating the standards of conduct are administrative and are imposed by the agency. Evidence of criminal statute violations must be referred to the Department of Justice or an Inspector General for investigations pursuant to 28 U.S.C. § 535. OGE also directs agencies to notify, and oftentimes assists agencies in notifying, the Civil Division of failure to file and false filing concerns on financial disclosure reports. If OGE becomes aware that an agency has not acted as it should, it can order corrective action on the part of an agency. It also has some limited authority to order corrective action on the part of individuals. The regulations implementing that authority are found at 5 C.F.R. part 2638. We strongly believe that we do not need any additional enforcement authority in this area. We believe our primary role as a counselor is properly complementary to the roles of investigator and enforcer that are found elsewhere in the Government.

Finally, your seventh question concerns our annual performance plan. We are all too acutely aware that much of what we are measuring is output and not outcome, if outcome is considered to be whether employees are more "ethical" because of our program. What we believe we can measure is whether OGE has substantially contributed to a branch-wide program structure that has as its objective a system that strives for reasonable and fair conduct policies, adequate opportunities for employees to become aware of and understand those policies, proactive conflict avoidance counseling, and knowledgeable sources to whom employees can turn for appropriate and timely advice when they have questions. If that type of system is in place, we then have to hope that employees will in fact appreciate and use it. Working with investigative and enforcement agencies to help ensure their

understanding of and support of this program is also an important element.

Even so, we are always looking at the experience of others in measuring the effectiveness of programs similar to ours. In fact we make every effort to keep up with efforts of the private sector and with other government agencies within the United States and around the world who carry out similar programs. We have presently put out a request for quotations for a limited survey of employees to see if we can afford to conduct at least some small baseline survey about our program. As you know, however, surveys are limited in the type of information they can provide and they are generally quite expensive.

You ask what evidence would we cite to support a conclusion that the ethics program has changed the level of integrity in the Federal Government. We have none to cite because there is no baseline from which to measure the integrity of the workforce 20 years ago when OGE was created (assuming such a measurement could have been possible.) What we do know is that over the 20 years of this program's existence, public financial disclosure and the need for divestiture and recusal have become accepted and expected processes, whereas they were certainly not when the Act was passed. We have had the support of every White House in our preventative measures particularly in conjunction with the steps we require of Presidential appointees through our review of their financial disclosures. We see that the press is now very aware of the restrictions applicable to officers and employees and their access to and use of that information seems to have certainly had an effect on those who might otherwise wish to ignore the program. And, we know that employees use the system to get advice, and that the Department of Justice has supported our preventative efforts through its enforcement authorities.

Do employees have a higher level of integrity now than 20 years ago? We had no reason to have questioned the general integrity of the workforce then, nor do we now. We do know that everyone is much more sensitive to the ethics requirements of public service and we can only count that as a positive change in the public service environment.

I would be happy to answer any questions you may have.

Mr. SCARBOROUGH. Thank you, Mr. Potts. Mr. Walden.

STATEMENT OF GREGORY S. WALDEN, PATTON BOGGS LLP, FORMER ASSOCIATE COUNSEL TO THE PRESIDENT

Mr. WALDEN. Thank you, Mr. Chairman, Mr. Cummings. I'm pleased to testify today in support of OGE's reauthorization. This is my fourth visit before this committee and I'm honored by your invitation as well by Mr. Potts' kind remarks.

In its 20 years of existence with just under 100 employees OGE has performed an essential role within the executive branch in fostering the public's confidence and trust in the integrity of government. On the whole OGE has performed exceptionally well and deserves to be reauthorized. Because of its solid performance, OGE ought to have a permanent place in the executive branch.

A single executive agency independent of all others is essential to fulfill the cardinal objectives of any system of government ethics: Uniformity, consistency, reasonableness, fairness and objectivity. At this point in OGE's history, the question before the Congress should not be whether to reauthorize OGE but whether OGE should be charged with any new or different authority.

I do not have a strong opinion as to the length of reauthorization, although I agree with Director Potts that a reauthorization should not expire the first or last year of any administration. In my opinion, it's a legislative judgment, to be made by those who oversee OGE, whether a regular authorization is necessary to provide the best opportunity for needed ethics reform. There are a number of programs run by the executive branch that expire after a certain time and need to be reauthorized. Those are important programs but the reauthorization period provides Congress with an opportunity to tackle necessary reforms. Regardless of whether the reauthorization is for 4 years or for 8, Congress should conduct regular oversight and I would suggest perhaps a yearly oversight hearing. Congress should oversee OGE the way it would oversee any other executive agency.

Regarding OGE's rulemaking authority, OGE needs to complete its rulemaking to implement and interpret section 209, the supplementation of salary statute, and in particular section 207 dealing with post-employment restrictions. Now, there is a consensus within the ethics community—perhaps not shared by Congress, that the post-employment restrictions matrix is excessive, it's complex, and it's uneven. But it's up to Congress to reform that statute. OGE cannot do it. What OGE can do and should do is issue interpretive guidelines because right now section 207 is a trap for the unwary. The matter is not made better but made worse in my opinion by President Clinton's Executive order, which is riddled with exemptions and loopholes, and is also more excessive than necessary and should be repealed by the next President.

It would also behoove OGE to conduct a rulemaking proceeding regarding the use of legal defense funds. Now, this is a difficult subject and OGE has done a good job, in my opinion, in giving advice to legal defense fund trustees and government officials to date, but I believe it deserves a comprehensive review by Congress and perhaps legislation will be necessary. Members of Congress and staff also from time to time have set up a legal defense fund and

perhaps there ought to be a single rule for all employees and officials.

Regarding OGE's investigative authority, OGE has statutory authority right now to investigate allegations that an executive branch official has violated ethics standards, but OGE's authority is circumscribed. OGE is just one actor in a cast of government investigators and prosecutors. And OGE by rule has further limited its authority to conduct initial investigations that do not rise to the level of a crime, deferring to agency personnel. As a general matter, I think that's reasonable, but occasionally there will be benefits to the public as well as to the administration in having OGE conduct that initial investigation. Where directed by the President or requested by a member of the cabinet, and provided OGE is given necessary resources, OGE could conduct an investigation in lieu of an agency ethics or IG investigation. In any event, if the investigation remains within the agency under current policy and practice, an OGE official in my opinion should be assigned to participate in such investigation to the extent necessary to ensure its thoroughness, objectivity, and faithfulness to OGE's interpretation and guidance. Perhaps agency ethics officials and IGs should be required to notify the Director of OGE and the White House Counsel simultaneously upon the initiation of an ethics investigation involving any Presidential appointee. The President could then determine whether OGE should conduct the investigation or whether a more formal role of OGE is necessary or appropriate.

Regarding OGE's audits or program reviews, I recommend that OGE rearrange its schedule of reviews to ensure that every cabinet department and the White House Counsel's office is reviewed in the second year of a new administration. With respect to training and education, I believe more attention should be placed on Presidential appointees, non-career SES officials and schedule C employees as well as employees in regional and field offices. My sense is that these two classes of employees, for different reasons, are most at risk of violating ethics standards.

In my prepared statement, I recommend several changes to the ethics laws. I wish to highlight only one of these recommendations in my opening remarks. The term special government employee should be clarified to codify the functional test used by the Department of Justice and OGE. Simply put, an informal advisor who participates regularly in internal agency deliberations or who supervises or directs other Federal employees, even an informal advisor who does so without pay or without formal appointment, ought to be subject to the conflict of interest laws and financial disclosure standards to which the rest of the Federal work force is subject. Yet, the current uncertainty of the application of the ethics laws to informal advisors has resulted in a number of situations where Federal functions are being performed by persons with conflicting Federal interests. For instance, agency personnel offices may not be sufficiently sensitive to the simple matter in which contract consultants unwittingly become special government employees.

In 1996 the House passed a revision of the SGE definition to codify the functional test. The Senate deleted the provision and the revision did not become law. I urge this Congress to clarify the SGE definition and to do so before the next President is inaugurated.

Thank you very much for the opportunity to testify and I will be happy to answer any of your questions.

[The prepared statement of Mr. Walden follows:]

ORAL STATEMENT OF GREGORY S. WALDEN

Mr. Chairman and Members of the Committee:

I am pleased to testify in support of the reauthorization of the Office of Government Ethics. This is my fourth visit before this Committee, and I am honored by your invitation.

In its twenty years of existence, OGE has played an essential role in fostering the public's trust in the integrity of Government. On the whole OGE has performed exceptionally well and deserves to be reauthorized. Because of its solid performance throughout its existence, OGE ought to have a permanent place in the Executive Branch. A single Executive agency, independent of all others, is essential to fulfill the cardinal objectives of our system of Government ethics: uniformity, consistency, reasonableness, fairness and objectivity. At this point in the history of OGE, the question before the Congress should not be whether to reauthorize OGE, but whether OGE should be charged with any new or different authority.

I do not have a strong opinion as to the appropriate length of time to reauthorize OGE. In my opinion, it is a legislative judgment – to be made by those who oversee OGE and the system of ethics laws governing the Federal workforce under OGE's authority – whether a regular reauthorization is necessary to provide the best opportunity for any needed legislative reform.

Regardless of whether OGE is reauthorized for four years, or eight, Congress should conduct regular oversight of OGE as it would perform with regard to any other Executive Branch agency.

Regarding OGE's rulemaking authority, OGE needs to complete its rules implementing several particularly thorny issues, including the supplementation of salary prohibition, 18 U.S.C. 209, and the post-employment restrictions contained in 18 U.S.C. 207. Although there is a considerable consensus within the ethics community that section 207 is too complex, uneven, and excessive, it is Congress and not OGE which must reform this section. In part because of this

complex and unsatisfactory matrix of restrictions, which includes President Clinton's ill-conceived Executive Order, it is incumbent on OGE to move quickly to issue interpretive rules, in the absence of corrective legislation. As it now stands section 207 is a trap for the unwary.

It would also behoove OGE to initiate a rulemaking proceeding regarding the use of legal defense funds by Federal officials. Up to now OGE has used existing ethics standards in providing advice, but this is a subject which deserves a comprehensive review.

Regarding OGE's investigative authority, OGE has statutory authority to investigate allegations that an Executive Branch official has violated the ethics standards. But OGE's authority is circumscribed, as OGE is just one actor in the cast of Government investigators and prosecutors. And OGE has by rule further limited its authority to conduct initial investigations that do not rise to the level of an alleged crime, deferring instead to agency personnel.

As a general matter, this policy is reasonable. However, occasionally there may be benefits to the public as well as the Administration in having OGE conduct the initial investigation. Where directed by the President, or requested by a Cabinet Member, and provided OGE is staffed with sufficient resources, OGE could conduct an investigation in lieu of an agency ethics or IG investigation.

Where the investigation remains within the agency, an OGE official should be assigned to participate in such investigation to the extent necessary to ensure its thoroughness, objectivity, and faithfulness to OGE's interpretation and guidance. Perhaps agency ethics officials and IGs should be required to notify the Director of OGE and the White House Counsel simultaneously upon the initiation of an ethics investigation involving any Presidential appointee. The President could then determine whether OGE should conduct the investigation itself or whether OGE should play a more formal role in the agency investigation.

Regarding OGE's program reviews, I recommend that OGE rearrange its schedule of reviews to ensure that every Cabinet Department (and the White House Office) is reviewed in the second year of a new Administration.

With respect to training and education, more attention should be placed on Presidential appointees, noncareer SES officials, and Schedule C employees, as well as employees in regional and field offices. My sense is that these two classes of employees, for different reasons, are most at risk of violating ethics standards.

In my prepared statement, I recommend several changes to the ethics laws. I wish to highlight one of those recommendation in my opening remarks.

The definition of the term *special Government employee* should be clarified to codify the functional test used by the Justice Department and OGE. Simply put, an informal adviser who participates regularly in internal agency deliberations or who supervises or directs Federal employees, even one who does so without pay or formal appointment, ought to be subject to the conflict of interest and financial disclosure standards to which the Federal workforce is subject. Yet the current uncertainty of the application of the ethics laws to informal advisers has resulted in a number of situations where Federal functions are being performed by persons with conflicting financial interests. For instance, agency personnel offices may not be sufficiently sensitive to the simple manner in which contract consultants unwittingly become special Government employees.

In 1996, the House passed a revision of the SGE definition to codify the functional test, but the Senate deleted the provision and the revision did not become law. I urge the Congress to clarify the SGE definition before the next President is inaugurated.

Thank you for the opportunity to testify and I will be happy to answer any of your questions.

Mr. SCARBOROUGH. Thank you very much. Let's begin our questioning with you, Mr. Potts, and let me ask you this. Since we've just had a discussion on special government employees, let me ask you whether the White House—this White House or any past White Houses, if it was even relevant then, has come to you and asked you for assistance in determining whether a particular individual fits into this class of special government employees; in fact, if they ever asked you that question.

Mr. POTTS. First of all, let me say that we support the idea of the legislation. In fact we're one of the forces behind that legislation being offered previously that Mr. Walden referred to, to in effect codify in the law the elements that we consider as a matter of policy in deciding whether someone is a special Government employee, but I would also caution that I would strongly oppose the idea of that being thrown into the reauthorization legislation. We don't want to have that cluttering up the reauthorization.

Yes, we have been consulted by, I would say, all White House counsel that have served during the almost 9 years that I've been director, and I say Counsel but that means someone in their office, about individual cases of whether someone is a special government employee, but I think the way that it's actually applied it's usually pretty clear as to who is and who is not a special Government employee if someone really is just willing to get the facts of what the particular arrangement is. So typically when we are presented with questions like that, it's more a question of just finding out factually exactly what is the person doing—are they working in a government office? Are they being supervised? And if they are, they're special Government employees and they're subject to all of the ethics rules.

Mr. SCARBOROUGH. To help us with this definition, let's talk about a few people that have played an active role in the White House, again just for the purposes of definition and whether they were, should be, or would be a special government employee under past definition or the proposed new definition. Let's start with somebody like Paul Begala or Dick Morris, where you read these books already on the history of the Clinton administration through the first 6 years and you see the very important people. I remember reading "New York Times" and "Washington Post" articles especially in 1996 talking about almost daily meetings of everybody sort of hovering around in the Oval Office and Dick Morris and Paul Begala being at the center of that and obviously being at the center of what activities all these government employees would be doing in these agencies over the next year. And I'm certainly not sitting here saying that's inappropriate because every White House, at least in modern time, has had their own—I guess I shouldn't say Dick Morris—everybody has had friends that have come in and those lines obviously get blurred.

But let me ask first of all just for the record was Paul Begala or Dick Morris classified as a special Government employee?

Mr. POTTS. I don't know specifically and I don't recall ever being asked. I gather you don't recall our being asked and it wouldn't be necessary, of course, for us to be asked because we expect each department agency, including the White House, to administer its own program. We're there to consult. There is, particularly with the

Counsel's office, a very active back and forth about a lot of issues. But we expect them to make those decisions and so we don't actually know in the cases that you cite.

Mr. SCARBOROUGH. Mr. Walden, should they be? Under your definition—and again, let's get out of the specifics of this administration and say—let's say George W. Bush or Al Gore, the next President, and they have people like this in and out of their White House, or Bill Bradley. We don't want to offend anybody from New Jersey. Should people in that position be classified as a special Government employee?

Mr. WALDEN. Yes. If the informal advisor is taking part regularly in internal agency deliberations, there really is no difference between that informal advisor and a White House staffer. I would distinguish the meetings that all Presidents have had with the head of the Chamber of Commerce or the head of the AFL–CIO, or a good counselor and friend, or the chairman of the RNC or the DNC, in one-on-one meetings with the President or another White House official. The President should be free to continue to get advice from anybody at any time but where that advisor is brought into the government and sits around the table and helps the agency, the White House, come to a decision, he is a de facto government employee.

I believe that conduct meets the functional test and I would say that based on public reports, if they're true, Paul Begala and Dick Morris crossed the line and were special Government employees. I don't want to fault Paul Begala or Dick Morris or Harry Thomason or even the White House office or certainly the OGE, but certainly within the Clinton White House there was management control of people coming in and making sure those people were judged yes or no and screened and required to file financial disclosure statements.

Mr. SCARBOROUGH. Do you think your clarifying definition that you're proposing would help clean this up a little bit for the next administration?

Mr. WALDEN. I think it would, but passing the law still requires people to administer the law and better management of the White House and some agencies would be in order. Clarifying the definition would make it very clear that even without a formal appointment, you can run afoul; you become a special Government employee.

Mr. POTTS. Let me say I agree with that and I think the passage of the law would help everyone in the government, including the White House, know exactly what the criteria are. They are out there but having it in a statute and clarifying that if a person is performing a Federal function and they are subject to supervision by someone that's clearly a Federal official, then they're a special Government employee. Those criteria would separate out the kind of people that Greg mentioned, like the president of the Chamber of Commerce or the president of a labor union or someone coming in. They clearly are not going to perform a Federal function nor are they subject to being supervised by someone in the Federal Government.

Mr. SCARBOROUGH. I'm glad you clarified that because I think the supervisory role helps differentiate—I've heard some people say

in the past they were a little concerned about this because let's say Mr. Cummings is President 10 years from now and he has a friend who's been a friend since he was 11 years old. Well, he should be able to talk to him every day and get advice from him so this definition in no way would stop somebody from leaning hard on a friend or even have a friend coming into the White House and talking and somebody that he could trust, but again supervisory issue is the key issue there?

Mr. POTTS. Right.

Mr. SCARBOROUGH. We're going to have two votes. Why don't we go ahead and take a break and we'll go over and vote and then be back hopefully in the next 15, 20 minutes.

Thank you.

[Recess.]

Mr. SCARBOROUGH. Mr. Cummings.

Mr. CUMMINGS. Mr. Walden, you talked about the special Government employees and I'm trying to go back to why we're here with regard to reauthorization. Mr. Potts' office didn't do anything wrong, did they, to your knowledge?

Mr. WALDEN. To my knowledge I don't have any criticism with the advice OGE has given under the special Government employee concept.

Mr. CUMMINGS. You were talking about certain investigations and I was jotting down notes real quick. Do we—since we're talking about authorization, Mr. Potts, you know the investigations he was talking about that he felt you should be involved in. What were those, Mr. Walden? Remind me.

Mr. WALDEN. I believe that going back to the allegations in, I believe 1994, involving the conduct between the Treasury Department and the White House, the Office of Government Ethics did look into the conduct of Treasury employees. I think it would have been more appropriate for the Office of Ethics to be asked to look at both the conduct of the Treasury Department employees and White House employees.

With regard to the White House Travel Office, after the initial criticism of the firings of the Travel Office officials, the White House conducted a management review. It was not done by the White House Counsel's office. There were some people in the Counsel's office who were involved in those things. I think that a review by the Office of Government Ethics would have received a lot more credibility from the public than the White House management review received. And I also think with regard to Secretary Espy, the White House conducted a review of the allegations against Secretary Espy but that report contained no findings or conclusions. I believe that if the Office of Government Ethics had been asked to do such a review, we would have gotten a more thorough comprehensive report.

Mr. CUMMINGS. So you think the—you think with that report, Mr. Espy would have gone through the same things that he went through? Based on—this is sort of hindsight, I know. But I'm just curious. That Espy case is one which—it really bothers a lot of people because—and I'm just wondering, I mean, it seemed as if just from what I've read that if it had gotten—that no matter what, it probably would have reached an independent counsel stage no mat-

ter what. That's from my reading as a lawyer, but I'm just wondering do you think it would have been a different result?

Mr. WALDEN. I'm not sure and perhaps not, Mr. Cummings. We no longer have an independent counsel law, so that shouldn't happen in the future. My concern all along was having the public understand what the facts indicated, that Secretary Espy had violated the ethics laws. I was not as concerned as to whether there were violations of criminal law. I thought there were violations of ethics laws and that was somewhat muddled in the appointment of the independent counsel. If I were in the Department of Justice or an independent counsel, I might not have sought to indict Secretary Espy. I thought it would be sufficient that he forfeited his office because of violations of ethics laws. But that again was muddled because of I think an inadequate White House Counsel's report.

Mr. CUMMINGS. With the doing away with the Office of Independent Counsel, does that put, you think, more of a burden on the Ethics Office in any way?

Mr. WALDEN. Not directly because the Ethics Office cannot conduct investigations of allegations of violations of criminal law. That's for the Department of Justice to do. Of course, inspectors general also can conduct preliminary investigations of criminal activity. I think that the vacuum left by the demise of the independent counsel law will be filled and should be filled by increased oversight by Congress as well as the Department of Justice, which would step in the shoes of independent counsel.

Mr. CUMMINGS. One of the things that you said is you think that the Ethics Office should come before the Congress with regard to oversight on a yearly basis; is that right?

Mr. WALDEN. Yes.

Mr. CUMMINGS. And what should we be looking for? In other words, when they come before us, they come before us every year, if you were sitting here and you had a sheet, a list of things that you want to check on, what kind of things would you be looking for and why?

Mr. WALDEN. I would ask the Office of Government Ethics how things are faring in the executive branch, whether the authorities they have are sufficient, whether the laws they interpret are unclear and deserve clarification. I might want to amplify my prepared remarks by saying that 20 years from now, I might not advocate a yearly oversight hearing but I think the ethics landscape still is unsettled. We have some new laws and until the Federal work force operates under an ethics system that's basically settled for a number of years, I think it would benefit Congress as well as OGE to have a regular exchange with Congress and yearly hearings once a year would fulfill that need.

Mr. CUMMINGS. The post-employment restrictions I think, section 207.

Mr. WALDEN. Yes.

Mr. CUMMINGS. And you talked about the guidelines needed. In the State of Maryland, we had a situation where—I used to sit on the committee that dealt with ethics—we had a situation where the legislature for whatever reason just refused to make clear what the ethics laws were because there were all kinds of scenarios and so you had the loopholes, but clarification would have—could have

cleared it up and so year after year people would come in, legislators would come in with various proposals and then we found—then we had some people who were convicted criminally of violations that were kind of serious and one of their defenses consistently was, well, it wasn't clear. And I say all that to say I take it you have a similar concern?

Mr. WALDEN. Yes, I do. And if memory serves, one of the first prosecutions under the post-employment restrictions law involving a Reagan administration official was overturned on appeal because the court of appeals found that the statute was ambiguous or didn't clearly proscribe the conduct. I think that's post-employment restrictions. It might be lobbying. I don't know. If it was post-employment restrictions, it illustrates the concern that when an ethics law is not clear it can't be understood. If it's not understood, you cannot expect reasonable people to follow it. And the matrix of post-employment restrictions right now is way too complex. High level officials are subject to maybe six or seven different proscriptions. Each of them has different language and then if you're a lawyer, you're subject to your local bar rules, which are more onerous than the Federal law.

Mr. CUMMINGS. So now, Mr. Potts, if you have someone who questions what they are about to do, what happens? Do you give them an advisory opinion or something?

Mr. POTTS. We will. It can be just informal oral advice or an issue comes up that we expect to come up repeatedly and in addition if it's a question that probably is cross-cutting across various departments and agencies, we would issue a written informal advisory opinion. Those are published and also made known throughout the ethics community through what we call paeograms. These are communications to the ethics community that would describe the actions that we've taken or the opinions that we've issued.

Mr. CUMMINGS. Now, do you agree with Mr. Walden on this clarification of 207? I think he mentioned another section too, 209?

Mr. WALDEN. The clarification most needed I think is the special Government employee section, which is section 202. Section 209, supplementation of salary, I think just needs the interpretation guidance, but section 207 is definitely post-employment restrictions.

Mr. CUMMINGS. Do you agree with that?

Mr. POTTS. We do agree with the 202. In other words, we think and supported previously legislation to clarify and put those criteria in the statute. So we would support that for sure. On the 209, the supplementation of salary provision, I don't see any need for any legislation on that right now. We made an attempt probably 5 years ago to clarify and simplify 207, which is the post-employment. It is extremely complicated and for a person who really sincerely wants to make sure that he or she conforms to that law; it is not easy to do it because it's really tricky. And so it requires constant professional advice about what you can and can't do, especially if you've been in the procurement area.

In any event, we made a proposal that was presented and the result was that some legislation was passed that made it a little more complicated rather than simplifying it. We felt like we got our fingers burned a little bit. We felt in that instance our attempt to

do good ended up doing some bad. I would strongly say if that is an area where the Congress would get involved, it really could make a difference. I might ask for my general counsel to add some comments because she's been very much involved in our consideration of what might be done to really improve 207 insofar as these post-employment restrictions are concerned.

Ms. GLYNN. I just wanted to make a couple of——

Mr. SCARBOROUGH. If we could ask you to just state your name for the record.

Ms. GLYNN. My name is Marilyn Glynn. I'm the General Counsel at the Office of Government Ethics. We agree that 18 U.S.C. 207, the rules on post-employment, are terribly complex. What OGE has tried to do is to simplify them for the average employee who has to comply with them. We've done a couple of education and training ventures. We've prepared a video that can be shown to agency employees describing that puts the post-employment rules in a setting very much like this. It's a congressional hearing. Folks like yourselves are peppering some poor former Government employee with questions about his post-employment activities. The video is an attempt to engender sympathy for the poor employee who can't possibly understand what this all about. We've also created pamphlets and educational materials that try to describe these rules in simple fashion. These materials urge employees to come and get advice in particular situations.

In connection with the 209 rule to which Mr. Walden made reference, we do have pending for review and have for some time, a draft interpretive regulation at Department of Justice. Hopefully we'll receive clearance on that shortly and publish a rule that can assist employees in understanding their obligations.

Mr. CUMMINGS. I just don't want anyone to—I mean, as I'm listening to you and I'm trying to put myself in a position of a lawyer to a client, I'm going to tell you, even after I've read all the regs and the rules and everything, you know what I'd do? I'd march them right straight to you and I'd sit down with them and say look, this is my client's situation. I want something in writing. I'm serious. Because if you are saying it's complicated, if you're saying it's complicated, then my God. I can imagine a lawyer and particularly someone who doesn't even have a lawyer has got to be, you know, going crazy. I mean, just—so anyway, it's something we need to take a look at.

Finally, I know we don't have anything to do with money in this committee but I'm just curious, Mr. Walden talked about a number of these investigations and what have you. Do you have enough money to do what needs to be done in your office?

Mr. POTTS. Our current budget is comfortable. Actually, if you go back during my term, we really assumed some additional responsibilities from the Executive order of President Bush. We had to ramp up and we got to the point at one point where we had about 100 employees. But most, probably over half of our people were hired within the 12 months or so following those additional responsibilities. So we had a lot of green people. And what we found was after some time we began operating where the knowledge curve enabled us to become more efficient. Then we just allowed attrition to bring us down to where we are now, at about 80. We really are

doing now with about 80 what a few years ago it took about 100 people to do because they were inexperienced and green and weren't attuned to their jobs. But so now we've been able to get down to a level that we are comfortable, assuming that we don't have any change in our responsibilities. I think we are at a good level right now.

Mr. CUMMINGS. Just one other question. You talk about the first and the fourth year. Help me with the fourth year piece. I understand the first year and I think I understand the fourth year but it seems like the first year is the big one.

Mr. POTTS. That's right.

Mr. CUMMINGS. Talk about the fourth year.

Mr. POTTS. The fourth year. The reason that's a problem is there are people that are leaving and they have to file financial disclosure statements. In other words, termination reports and we have to review those. And of course that gets to be a big volume. But also there is a flurry of activity in new appointees to fill. Even though it's for a very short term, there is a big bulge of people that are getting appointed in the last few months. Already we see that starting up.

Mr. CUMMINGS. And you've got to turn it around quickly.

Mr. POTTS. Got to turn it around quickly, right. So there is that sort of bulge. It's not as bad as the first year of a Presidential term but still, there is this bulge in the first year. Then it goes down and then it kicks back up, particularly in this financial disclosure review area.

Mr. CUMMINGS. So this is—when do you leave office?

Mr. POTTS. My term ends August 15 of next year.

Mr. CUMMINGS. I don't know whether we'll see you again before then but I want to thank you for all you've done.

Mr. POTTS. Well, thank you.

Mr. CUMMINGS. For our country. I really mean that.

Mr. POTTS. I appreciate that.

Mr. CUMMINGS. I've heard a lot of great things about your efforts in that office. So often I think what happens is our public employees don't get the thanks which they deserve because you give so much for so little but so much benefit to the American people. So I just wanted to take this moment and thank you.

Mr. POTTS. I appreciate it. Believe me, it's been an honor to serve. I wouldn't have had it any other way.

Mr. SCARBOROUGH. Thank you, Mr. Cummings. I've got to say I've heard great things about you also and the record today is going to reflect that you're a perfect fit for the Office of Government Ethics because you were asked a very un-Republican question. That was, did you have enough money for your agency? I wrote it down because it's a bit historical today. You said, quote, we are comfortable and second, you said we are, quote, at a good level. Only the Director of the Office of Government Ethics would say that. I thank you for that.

Let me ask you in your agency's review of oversight of other agencies, you talk about best practices. Could you illustrate a few agencies on the upside that have constantly shown best practices and also a couple of agencies maybe that have had some trouble operating to the high standards of the best.

Mr. POTTS. Yes. We give awards at our annual conference agencies who have gotten in effect a clean program review; in other words, a review where we really don't have any recommendations that something has to be changed. We might make some suggestions about things that could be a little better or whatever. I would say over the last few years the various Defense Department components have had this sort of outstanding records. Not without exception, but for the most part our reviews of the various Defense Department components have resulted in a lot of clean reviews.

Mr. SCARBOROUGH. You have speculated or do you have any reports as to where that is? Is that a military culture? What do you and your other people that work with you put that down to?

Mr. POTTS. I think first of all it is partly culture but I think it's also money. In other words, I think they have the resources. Once they get the assignment, they have the resources and by gosh, they go out and do it. We have also I had a list of——

Mr. SCARBOROUGH. You can submit those for the record. That's fine.

Mr. POTTS. One department, for example, that's had a very good program is the Department of Education. Secretary Riley has taken a personal interest in the program and has showed that personal leadership, which really is one of the things that is the hallmark of virtually any good program, that the head of the agency is out front talking about ethics and how important it is. So that is very key.

On the positive side, let me mention a couple of others: The International Trade Commission, the General Services Administration, the Federal Communications Commission, Federal Deposit Insurance Corporation, Overseas Private Investment Corporation. Those are some that in this past year were reviewed that had excellent programs.

In the last year, we had several agencies that were deficient. It coincided with the downsizing of the agencies and particularly for two of the cabinet departments, Interior and Agriculture, we had to issue formal notices of deficiency. Both of those were agencies where the ethics program is run through the personnel shops and, in answer to your question as to why, I think what happened was the personnel shops were getting chopped a lot during that period for a lot of other reasons. They were just the ones that felt the sharpest edge of the ax. With the ethics program being part of that, they just all of a sudden didn't have the resources, and they were really scrambling to keep their program going. I'll say in both instances after the notice of deficiency, we worked with them and they have gotten their act together. We have already rescinded the notice of deficiency for the Department of Interior, having gone back in and being satisfied they have the program back on track.

Department of Agriculture has taken heroic measures. They've created a new Office of Government Ethics within the Department of Agriculture. They consulted with us and hired as to someone who had managerial experience as well as ethics program background. And they have made great progress, but they're not quite there yet. But the situation in Agriculture frankly is more complicated because they have all of these different components. They're scattered all around, literally around the world and it's

been harder for them to get their hands around it. They're going to get there and we'll be right along helping them.

Mr. SCARBOROUGH. Since the White House is graded on its own scale as a separate agency, where do they fit on that scale?

Mr. POTTS. They got a very good report when we reviewed their programs. The last review was 1996 and 1992, so we've had them on a 4-year cycle. They'll be coming up next year.

Mr. SCARBOROUGH. What about your dealings with the Justice Department? Have you referred more or fewer cases to the Justice Department of late than let's say you'd done 5 or 6 years ago?

Mr. POTTS. The cases that come to us for referral are really kind of haphazard. In other words, if a person is really knowledgeable, they wouldn't really come to us thinking that we're going to take it and then send it over to Justice. So it's kind of just haphazard as to how things happen to come over the transom or we become aware of some particular situation. But things like that do happen and when they happen, if it's clearly criminal in nature and especially if it's something that seems to be ongoing, we would send it over to Justice and expect the FBI to investigate it. If it's more of an administrative nature, then we would send it to the Inspector General where that person worked for the investigation.

Mr. SCARBOROUGH. Let me ask you some questions that either one of you can answer because it may sound a bit political. You may be more comfortable, Mr. Walden, in responding. I was wondering, obviously we have the First Lady, who's considering a run for the Senate campaign, and when the President—whenever Air Force One goes somewhere and campaigns, there's always a portion of the use of Air Force One and the security arrangements, other factors associated with the office that recognizes political expenses and billed to campaign. I was curious, do you think under the set of laws that we have right now if Mrs. Clinton decides to campaign for Federal office next year, would she be subject to the same regulations regarding the appointment of expenditures? Should she be?

Mr. WALDEN. If Mrs. Clinton qualifies for a candidate as defined in the Federal Election Commission regulations, then that would trigger the reimbursement provisions under Federal law and Federal standards. There are additional questions involving how many people travel on government airplanes and which persons are necessary to travel for official reasons. When the President or the Vice President travels for a political activity, there are still a small set of individuals who must accompany the President or the Vice President at all times and we had a term for them in the Bush White House ''Official travelers.'' We kept a list of those people. Those people would travel with the President even to attend a political event, but they could not participate in the political event and there was no reimbursement required of the Bush-Quayle campaign. With regard to the First Lady, I would simply ask, does the First Lady require—how many people if anybody, does the First Lady require in terms of official travelers? There are obvious reasons why the President has to have his staff secretary, military aides, and a few other people always with him because the President is always President. The First Lady may always be First Lady but not in the same sense as the President is always the President. So I think those issues are difficult and I think that the White

House, working with OGE and perhaps the Federal Election Commission, should work out a set of standards and protocols so there won't be any questions.

Mr. SCARBOROUGH. In your opinion should the First Lady or the Vice President's wife or the Vice President's husband be subject to the same ethics laws as the President and Vice President? We're getting into a new era. First Ladies have always been engaged but obviously in the future I think that they're going to be more so. Hillary Clinton has been a trend setter of sorts and I think you're going to see more and more professional First Ladies or First Men in the future. Do you think she has sort of opened the door a little bit to what the future is going to be and does that also raise some concerns regarding closing the loophole on first spouses?

Mr. WALDEN. I actually recommend that Congress tackle the issue and do so in the next year or two. I would recommend that, to the extent the first spouse observes the traditional responsibilities of First Ladies, that is, quasi-diplomatic, going to state events or funerals or charitable activities, that would not make that First Lady or first spouse a special Government employee or regular employee. But Mrs. Clinton was charged to chair the Health Care Task Force. She was, within the White House, Donna Shalala, and I don't know why the ethics laws wouldn't apply to her unless Congress made the legislative judgment that Congress made years ago with regard to the President, the Vice President, and Members of Congress that they would not be subject to the conflict of interest laws. When Congress did so, I think there was a recognition that the public scrutiny on the President and Vice President and Members was such that Members of Congress and the President and Vice President would follow general ethics principles because they wanted to stay out of hot water and not have ethics allegations distract from their duties. I'm not sure the same consideration applies to First Ladies. It might because First Ladies, first spouses, are within that same bubble within the White House that gets enormous scrutiny. What I believe is that under current law the First Lady crossed over the line and should have been considered an employee under 18 U.S.C. 202, the special Government employee definition that's in that statute.

Now, the court of appeals in a litigation challenging the Health Care Task Force's meetings under the Federal Advisory Committee Act, said that Mrs. Clinton was the functional equivalent of a government employee, thereby allowing the task force to close its meetings to the public because all of the members of the task force had to be full-time government employees. But the court of appeals dropped a footnote and said, we're not going to decide whether the First Lady is a government employee for purposes of the ethics laws.

That's the big question. I don't think it was answered appropriately or completely by the White House Counsel at the time. When Representative Clinger asked the White House Counsel, whether the Federal Advisory Committee Act law should be changed to make sure that the First Lady would be considered part of the government so that the meetings could be withheld from the public, the White House Counsel said, we don't need legislation because she's not a government employee under Justice Department

opinions. But the Justice Department precedent relied upon involved Mrs. Reagan's charitable fundraising and that is not comparable to the responsibilities that Mrs. Clinton has exercised.

Again, I don't want to fault Mrs. Clinton. I want to fault the system and the management within the White House that did not appreciate the difficult issues that were presented, the public criticisms that would result, and attempt to work out a system where everybody would be happy.

Mr. SCARBOROUGH. I think on the specific issue of the Health Care Task Force to me, it's a very clear example of somebody that should have been—had that classification. I think that is black and white. While I'm not surprised that the Justice Department came to the opinion that they did, I think that opinion is laughable because she was engaged in activities that would affect one-sixth to one-seventh of the Nation's economy based on what the Federal Government did, what the administration did. So for me—I say all that not just to make a political speech but to say that one seems easy to me.

What is not so easy are some middle grounds that we may tread on in future administrations with first spouses. So in a situation not quite so clearcut, but if you think I'm terribly wrong in my assessment, you can correct me. But let's say we have an administration in the future that is a bit more subtle than the First Lady. Do you think that first spouses should have the same ethical laws attached to them as the President and Vice President?

Mr. POTTS. I think Greg put it very well. First of all, I think it is complicated because we are in this transition period about the role of the First Lady, and I agree with your comments, Mr. Scarborough, that we should expect that to probably continue. Therefore, I think it would really be a wise thing for the Congress to take a look at this and then establish some ground rules because I would agree with Greg that if a spouse is playing the traditional role, there isn't any reason for him or her to fall under the ethics laws. But if the spouse is in there really performing a government function or running a task force or something like that where it really is substantive, then all those rules really should kick in.

Now, let me just add a couple of thoughts. One is that, the President and the Vice President because they are elected executive branch officials are not subject to the same conflict rules as other people in the branch. But they do have to make public, for example, all of their gifts. They have to show what the gift is, who gave it and an estimate as to its value, so the public can be informed about the gifts and make individual judgments about whether that is improperly influencing the President. And so I would say those rules for a First Lady would be appropriate if she is getting into the same area.

One other comment is that with regard to the travel of the First Lady, sometimes security issues arise. For example, in the Bush administration, there was a time when there were a lot of concerns about terrorist activity. President Bush had said there were certain people that he wanted to use government transportation only. Not only for their own protection but also, he didn't want them on a civilian airliner where other innocent people might get killed. So they were required, even for personal uses, as well as much less

political or government, to use government transportation. Then there was a formula by which they had to reimburse the government when they used government transportation for personal purposes.

So I don't know whether that's the situation with the First Lady right now or what the situation is but it's just something to bear in mind. Where there are reports from the CIA or the FBI that there is some imminent threat, I think things are tightened up and some officials that normally would travel commercially are directed to start using government equipment only.

Mr. SCARBOROUGH. Let me ask you one final question. Back in 1989 Congress passed a law that banned honoraria for writing, speaking. And they also banned that for Federal employees, which I think a couple of years later, the courts ruled that to be unconstitutional. I know Mr. Walden has suggested that you all clarify issues regarding honoraria and I thought I read that you all had been working on it and was wondering what sort of progress is being made on that or if you even think it's necessary. Is it something you'd like to see done before you leave next year?

Mr. POTTS. Let me just comment and then I'll ask Ms. Glynn to comment.

First of all, it was clear to us after that honoraria ban law was passed that we thought it was unconstitutional, and we went back and tried to get some corrective legislation passed to deal with our concerns. It was not any big surprise when it was challenged. After the Government lost in the lower courts and was going up to the Supreme Court, we met with the Solicitor General and said, our opinion is this is a loser. It's a waste of time to go up there and fight it. But I think they felt since it had been enacted by Congress, they had an obligation to try to uphold it. So anyway, it was not a big surprise to us that it was held unconstitutional.

But let me ask Ms. Glynn to sort of explain what we have done subsequently as a result of that.

Ms. GLYNN. We did amend our regulations to drop references to the prohibition on receipt of honoraria but there is a continuing trend in the courts toward expanding employee's rights in this area. We have a rule, in addition to that former prohibition on receipt honoraria, that prohibits employees from accepting compensation for any teaching, speaking, or writing that's related to their duties. In a challenge by a group of employees from the EPA, the D.C. Court of appeals ruled that a provision of that rule was unconstitutional. It was the provision that relates specifically to accepting reimbursement of travel expenses from outside sources for speaking about your Government job.

So we have informed the Federal work force that they are now free, if they're below the non-career senior employee level, to accept reimbursement of travel expenses from outside sources for speeches about their government jobs. And we're amending the rule to reflect that.

This is an area that's developing along a line that gives us some concern, frankly, because the courts seem to be opening up the door toward permitting more acceptance of compensation for talking about your government job. The courts' rulings are going in a direction that gives us concern.

Mr. POTTS. Let me just add—I don't want to take up too much of the committee's time, but this is a very interesting area. I was at a conference at which the head of the British civil service was also there. I was describing this case in which our regulation had been held unconstitutional because of basically how it had been applied. This particular EPA employee was getting reimbursed expenses to make a speech criticizing the EPA. When I got through describing it, I could see the look on his face was just like I must be lying; can't possibly be true. And I said, well I can see this is hard to swallow. He said, well, first of all the whole philosophy of the British civil service is one of loyalty to whoever is elected and in power, that you can't have a civil servant going out and undermining government policy. They get fired immediately for being disloyal. And I said, well, you don't have a first amendment. We do. And again, even as close as we are with Britain and we think of ourselves as cousins, yet there is a very fundamental difference in government structure because we do have that first amendment right. In this case, I have to say that I thought it was stretching the first amendment to say that this person was entitled to get reimbursed expenses for expressing his view.

We were saying we don't have any problem with the individual saying whatever he or she wants to say whenever and wherever. However, we don't think they're entitled to get reimbursed the expenses. We have a real ethics problem there because you had a situation where a person couldn't get paid for talking about their job. Well, the obvious end run around that was to say, oh, well, OK you can't get paid for talking about your job but we want you to come out to Hawaii. We have a suite for you on Waikiki Beach. We have lavish meals and entertainment. All we're going to do is reimburse you those expenses. So that's what we were focused on to try to prevent. We've now had to change that rule and that loophole has opened up because of this first amendment case.

Mr. SCARBOROUGH. That whole situation about flying to Hawaii for this conference, I know it shocks the conscience of all Members of Congress. That sort of thing wouldn't go on here. I'm sure also that some Members of Congress might like the court's expansive interpretation of the first amendment also for purposes of accepting honoraria but I don't think that's going to happen soon.

I have no more questions. I want to thank both of you for coming. Director Potts, again we certainly appreciate your service. And Mr. Walden, thank you for coming again. We're honored to have all of you as well as you, Ms. Glynn. We appreciate the testimony. We certainly want to assure you that we will work with you any way we can to work on a reauthorizing bill that can be drafted and passed in September.

Mr. POTTS. Thank you very much.

Mr. WALDEN. Thanks for the invitation.

Mr. SCARBOROUGH. Thank you. We're adjourned.

[Whereupon, at 12:24 p.m., the subcommittee was adjourned.]

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